IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.207 OF 2002

Jaibunnisa Dilawarbeg Mirza ...Petitioner
Vs.
Dilawarbeg Mehtabeg Mirza & Anr. ...Respondents

Shri J.G. Reddy for the Petitioner.
Shri Anilkumar Patil with Mr Rameshwar and Ujwal Patil for the Respondent No.1.
Shri S.S.Tatkore, A.P.P. for the State.

CORAM : S.C. DHARMADHIKARI, J.
DATE : DECEMBER 16, 2005.

P.C.:

1. Heard Shri Reddy appearing for the Petitioner and Shri Patil appearing for the Respondent No.1. The learned P.P. appears for the second Respondent.

2. Upon a Revision Application preferred by the first Respondent-husband, the learned Sessions Judge interfered with the order of the Magistrate granting maintenance in favour of the Petitioner-wife under section 125 of the Code of Criminal Procedure, 1973.

3. The learned Sessions Judge allowed the criminal Revision Application principally on the ground that the Petitioner-wife has been divorced by the first Respondent-husband. Upon a divorce being pronounced in accordance with Muslim Law, she is disentitled for claiming maintenance under section 125

of the Code of Criminal Procedure, 1973 is the finding given in favour of the husband which is assailed before me by the Petitioner-wife invoking the writ jurisdiction under Article 227 of the Constitution of India.

4. Rule was issued on this Petition and I am informed by Shri Patil appearing for the first Respondent that the amount awarded by the Trial Court towards maintenance has been deposited in the Trial Court and the said deposit is without prejudice to the rights and contentions of both sides in this Petition.

5. When this Petition was placed before me for hearing and final disposal, Shri Reddy brings to my notice the order passed by the Trial Court wherein at paragraph 7 the Trial Court has noted the submission of the first Respondent-husband based upon a plea raised in the Written Statement filed in the maintenance application. The plea is to this effect that the first Respondent has divorced the wife. He has sent to the wife the Meher amount under money order. The divorce/talaq according to the first Respondent is sometime in the year 1995. Reliance was placed upon an alleged admission in complaint filed by the first Respondent against the Petitioner herein and

her father alleging offences under section 504, 506 read with section 34 of the Indian Penal Code. The complaint is numbered as Criminal Case No.886 of 1995.

6. Before the Trial Court neither is the copy of the complaint produced nor the same referred to by the learned Magistrate. Similarly, the plea recorded therein including the compromise purshis (Exhibit 34) dated 15th July, 1997 is not produced on record in accordance with the provisions contained in Indian Evidence Act. Thus, the materials pertaining to the divorce/talaq by the first Respondent-husband were placed for the first time before the Revisional Court. Accepting the Revisional Court has interfered with the order passed by the Trial Court. As stated above, before the Trial Court these materials were not produced although the Written Statement contained the specific plea referred to above.

7. In these circumstances, the Revisional Court ought to have remanded matter back to the Trial Court to record a positive finding with regard to the divorce/talaq obtained by the first Respondent-husband. It was plain duty of the Revisional Court to have framed the issue/point for determination by the Trial Court considering the

averments in the Application of the Petitioner-wife and denial of the first Respondent-husband thereto. This course having not being adopted, in my view, interest of justice would be served if the order passed by the Revisional Court is substituted with an order of remand to the Trial Court rendering the finding specifically on the issue which is framed as under:-

. "Whether the Opponent-husband proves that the Applicant-wife has been divorced by him in accordance with the Muslim Law?"

8. The Trial Court to record a finding on the said issue after giving opportunity to both sides to place such materials as are permissible in law. The Trial Court to decide this issue within a period of three months from the date of receipt of copy of this order.

9. In addition to the said finding, the Trial Court should determine as to whether the Applicant-wife has proved that she is entitled for maintenance and needless to further state that based upon this finding, the learned Magistrate to determine the quantum of maintenance. However, this order is

passed because Shri Patil makes statement that despite succeeding in the Revisional Court the first Respondent-husband would not claim the amounts which are deposited in the Trial Court till such time as the Trial Court decides above issues. The Trial Court also to consider the Application of the Petitioner-wife for ad-interim orders pending determination of the aforesaid issues in case the Trial Court is unable to render the finding within time stipulated above.

10. Petition is disposed of in the above terms.

JUDGE